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Some Remarks to General Clauses of Treaty Space Law

The progressive development of international space law after the Moon Agreement undeniably came to a standstill. To use an expression in style: it is on a parking orbit awaiting new, positive impulses. Obviously other grave cares of the international community prevail. New challenges concerning traditional institutions of the system of general international law come before the efforts to go on with building the structure of treaty space law.

The period of calm gives an opportunity to revive theoretical problems of positive treaty law. To reconsider certain questions of interpretation raised by the *jus conditum*. It may be perhaps useful to *jus condendum* for future law-making. With my modest observations I would like to contribute to the discussion on three characteristic general clauses of the Space Treaty and the Moon Agreement:

Province of all Mankind

The exploration and use of outer space shall be carried out for the benefit and interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind. (S.T. Article I.1)

Envoys of Mankind

States parties to the treaty shall regard astronauts as envoys of mankind in outer space and shall render them all possible assistance. (S.T. Article V.1)

Common heritage of Mankind

The Moon and its natural resources are the common heritage of mankind. (Moon Agreement Article XI.1)

I

The insertion of clauses containing certain general principles has been a generally accepted method of national and international law-making. Continental codifications of civil law one and all built into their system principles going back to Roman law. E.g. Treu und Glauben to *bona fides, aequitas, exceptio doli, boni mores* etc. (1) The theory of international law has been always ready to apply civil law analogies, principles and terms of Roman law to international legal relations. Our science of international space law does the same – e.g. *res communis omnium* for status of outer space.

The general clauses of domestic laws prescribe a certain behaviour for cases not regulated by specific provisions of the Act concerned. To bridge over shortcomings the legislator converts moral postulates into positive law rules. This is why the German Author *Justus W. Heidemann* wrote his book on general clauses (1933) under the title "Die Flucht in die General-klauseln" (Escape into general clauses). In his opinion the legislator using general clauses as means of technics of codification escapes from creating detailed rules for problematical legal relations. (2)

General clauses of space law treaties have a special common feature. Space age downed upon us when mankind is divided by fundamental antagonisms due to political, economic and moral differences, split by state sovereignties. In an international community comprising "high-tech" societies and groups of people living under rudimentary conditions. The exploration and use of outer space, however, is a global activity. Its efforts, advantageous or harmful, cannot be restricted to one nation or any group of nations. Today the structure of the international legal order lags behind technical achievements. The discrepancy fully could be solved only by the rather utopistic status of moral and political unity of mankind. It is not accidental, that the nucleus of all three general clauses of treaty space law is mankind itself. The first inevitable question for their analysis is therefore the legal meaning of mankind.

II

According to the Vienna Convention on the Law of Treaties (1969) a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object an purpose. This provision of the Convention refers to the classic methods of interpretation.

The term **mankind** occurs in several international instruments. Among others in the Preamble of the U.N. Charter, Preamble of the North Atlantic Treaty (1959) the Treaty on the Non-Proliferation of Nuclear Weapons (1968) and especially in the, U.N. Convention on the Law of the Sea (1982). All without definition of mankind or any indirect information on the meaning of the term in the treaty.

What is the *ordinary* meaning of mankind?

According to various vocabularies and etymological works mankind is the human species (3), or human race (4). In Hungarian handbooks "emberiség" (=humankind) means the human genus (5), but also collectivity or "nation" of human beings. (6)

The common feature of definitions in the legal literature is that mankind comprises only human beings independently of politically motivated states. It is an abstract notion covering all humans wherever they are living. Moreover we find an opinion that mankind comprises all of our contemporaries, all the future generations to come, and men of the past also belong to it. (7)

By insertion into the Space Treaty and the Moon Agreement mankind became a conventional term, to be interpreted. The general clauses moved two outstanding pioneers of space law theory to attribute international personality to mankind.

Praising the Space Treaty *A. A. Cocca*, concluded that "the international community from now on has recognized the existence of a new subject of international law namely Mankind itself, and has created a *jus commune humanitatis*." (COPUOS Legal Subcomittee June 19, 1967) (8) According to *M. G. Markoff* "for the first time in history mankind was recognized in positive law

by the international legal order as a subject of this order" considering mankind as the main beneficiary of the results of the research, exploring and use of outer space. (9) In a more cautious formulation this opinion was accepted by some other authors. *M. I. Niciu* minded: "At present we are at the beginning of the process of the assertion of mankind as a subject of public international law, nevertheless mankind does not yet meet all the requirements for becoming a subject of international law." (10) In the Hungarian literature of international law we find similar views. "Mankind does not mean the totality of states assigning rights to it, but it may be user of certain rights granted by international law. It has therefore legal personality in a limited sphere." (*K. Nagy*) (11) "The passive legal personality of mankind has to be acknowledged." (*B. Nagy*) (12)

On the other hand the majority of authors does not accept the theory of legal personality of mankind. Main argument of the refusal is the unquestionable absence of any organization or institution representing it independently of and above the states.

S. Gorove puts the question: how could one state or group of states or an international organization be a spokesman or representative, of all mankind without some formal act of authorization or mandate involving such representation? (13) *N. M. Matte* accentuates the same doubt: one cannot avoid questioning the meaning of the word mankind and how it could be represented in a future international regime? (14) The negative answer to this question appears in the argumentation of the opponents almost unanimously. To quote some opinions: *A. Górbiel*: Every subject of international law must have an organ competent to represent it in the international relations. There does not exist any such organ representing the mankind as a whole, (15) *S. Courteix*: The human species named mankind (*ensemble du genre humain*) without an independent state-organization (*gouvernement supranational*) could act in outer space only by a "trustee" otherwise legal personality of mankind hardly would be accepted. (16) *K. Tatsuzawa*: A state or group of states can't represent the will of all mankind. Mankind is not yet institutionalized as such. It remains only a philosophical concept in the actual stage of human progress. (17) *R. Arzinger* The opinion that mankind would be a subject of international law which could act without representation as an entity do not have a base in contemporary international law. (18) *R. V. Dekanozov*: The term mankind speaking strictly legally is in fact conventional, since mankind is not an independent subject of international law with its rights and obligations. (19)

On my part I share the opinion of the opponents. A subject of international law is the bearer of rights *and duties*. (20) Definitions omitting the later element could hardly be found.

Sea law and space law making references to mankind as a whole granting certain rights to it and obliging states to a special behaviour towards it do not promote mankind to subject of international law. (21) If the alledged subject of international law does not have the ability to enforce rights (22) attributed to it, is no real subject of the international legal order. The *passive* legal personality is a typical *contradictio in adjecto* – self contradiction. (23) The presumption appearing also in the Hungarian literature that there exists an organ acting in the name of mankind, is erroneous. Mankind – totality of some 6 billion human beings – did not give an authority of representation to any organ or organization. Not excepted the United Nations which motivated by humanitarian objects repeatedly refers to it. (24) The interpretation of the term Mankind in the context of the three general clauses and in the system of the two treaties results in different conclusions.

III

Envoys of Mankind

From this viewpoint the "envoys of mankind" clause seems to be the least problematical. "States Parties to the Treaty shall regard astronauts as envoys of mankind in outer space" – nobody would conclude from this provision of Article V. of the Space Treaty that astronauts during their mission are envoys in sense of Article 14.1a of the Vienna Convention on Diplomatic Relations. The Space Treaty by this symbolical wording obviously confirms a moral obligation, namely to render to them all possible assistance in cases of accident, distress or emergency landing.

The Rescue Agreement in Articles I-III obliges the Parties (today 88 states) to measures which probably all states would undertake motivated by the moral consideration expressed in the general clause.

Province of all Mankind

"All space activities shall be carried out for the benefit and in the interests of *all countries* …and shall be the province of *all mankind*." This provision of the Treaty occurs in the first Article of the Space Treaty and not in the Preamble where the States Parties to the Treaty only confirm the common interest of all mankind in space exploration. No doubt, it is to be recognized that the general interests principle of Article I.1 keeps its full binding force under present international law. (*M. Markoff*) (25)

The general clause clearly consists of two elements. Exploration and use of outer space shall be carried out in the interest of *all countries* i.e. not only of for today 97 states parties to the Treaty and will be the province of *all mankind*. (26) The difference is evident. This provision of the Treaty demonstrates the inherent ambiguity of general clauses. From the rather loose terminology one could follow, that the "province" relates to outer space including the Moon and other celestial bodies within the solar system. The grammatical interpretation of the first sentence of Article I.1 makes clear that the "province" as a metaphorical expression is referred to *activities*: exploration and use of outer space.

Taking this clause literally: *a contrario* activities which are carried out not in the interest of all countries would constitute a breach of a treaty obligation. Some authors – I myself belonged to them (27) – in all good faith minded that e.g. the activity of military reconnaissance satellites which is carried out only in the interest of the launching state, is inconsistent with the principle of "interests of all countries." (28) The interstate practice long ago transgressed this interpretation. Moreover, the theory of space law is ready to attribute a peace-keeping role to this kind of space activity. Up to now no formal protest is known to have been made concerning the surveillance by satellites. The same can be stated for operational military space activities in armed conflicts. These are carried out clearly in the interest of a single state or group of states. The international community accepted it without referring to the general clause of Article I.1 of the Space Treaty. The silent consent seems to confirm that the clause felled victim to a continuous *desuetudo* by the interstate practice. (29) Similarly: is profit-oriented commercial space activity carried out for the benefit and in the interests of all countries? (30) The answer in certain cases may be positive. There are such activities indirectly contributing to general progress and development though literally not consistent with the "interests of all countries" clause.

Common heritage of mankind

The principle CHM with its symbolistical logic penetrated so quickly and deeply into the thinking of international lawyers that any critical approach to it seems to be a profanation. This opinion of *A. Bueckling* (31) is thought-provoking. It should be added, however, that nothing for the theory is a taboo, and nothing absolves it from the task of constructive criticism.

The CHM-clause differs essentially from the two others. It was formulated upon a civil law analogy to apply to the exploitable resources of the ocean protecting the interests of technologically less advanced states. The Convention on the Law of the Sea of 1982 (Part IX, Article 136) declares that the seabed and ocean-floor and the subsoil thereof… as well the resources of the area are Common heritage of Mankind. (32) In the same way the general clause of Article XI of the Moon Agreement lays down that the Moon and its natural resources are CHM. (33) This provision applies according to Article I to other celestial bodies within our solar system, and finds its expression in particular in par.5 of Article XI providing the establishment of an international regime to govern the exploitation of natural resources and par.6 on the equitable sharing in the benefits derived.

Analogy has a certain role in the development of drafting new rules of law. Law-makers are often ready to adopt existing legal institutions or concepts for changing needs. (34) It is relationship between two things which are similar in many though not in all respects. (35) In our case the analogy supposes the similarity of characteristic elements of two analogous legal relations.

Hereditas in Roman law – as contemporary heritage – was the succession to the whole right (*universum jus*) which the deceased had. It meant the complex of goods, rights and duties of the deceased i.e. the legal position of the heir who enters into the legal situation and legal relations of the deceased. (36)

Speaking on heritage of mankind delicate questions come up: From whom inherited the mankind the Moon and its natural resources? Who was the "*defunctus*" – the deceased? The former generation? But generations can not be separated in time. They are living together and the history of mankind is an unbroken chain of past, present and future. Who was the original proprietor? If nobody, the Moon and its natural resources could not become a heritage.

The Roman law analogy is also discernible in the theory of mankind comprising the future generations to come. (37) In this way as against the moderate wording of Article IV of the Moon Agreement (38) CHM would be extended to unborn generations, following the principle "*nasciturus pro jam nato habetur quotiens de commodia ejus agitur*". (An unborn child is considered born when his interests are taken into account.) The analogy, however, would be rather inappropriate. The rights of an unborn child in civil law systems can be enforced by an adequate representative. But who should represent our descendents – against us? All these questions demonstrate that the *per analogiam* application of the civil law concept of "heritage" to the Moon and other celestial bodies of the solar system unwillingly leads to a dead-end.

Concerning legal nature of the CHM-clause we find different views in the theory. Some authors regard it as a *real legal requirement* implying that any benefit from space activities should be for all mankind. Others consider it as an expression of socio-political ideas. (39) The extreme opinion is, that CHM is an imperative rule of general international law. "The principle is embodied in many legal instruments, treaties and resolutions and explicitly or tacitly recognized by state practice, which is evidence of the existence of a general consensus *together with the conviction of its*

nature as jus cogens." (40) This opinion leaves essential facts out of consideration: the Moon Agreement up to now has been ratified only by 10 states, moreover an interstate practice in this respect supposes the feasibility of the exploitation of Moon-resources. For the time being it is technically impossible.

The greater part of publicists accepted the view that CHM is not a legal but a philosophical and political concept, since the majority of states has not accepted it either explicitly or implicitly. (41) As expressed by Professor *A. A. Cocca*, most ardent follower of the idea of CHM from the very beginning: "it is an ethical norm and essential for survival *rather than a compulsory rule by force of law*… a symbol of harmony, progress, friendship, understanding and peace." (42) Coming back to my opinion of the special role of general clauses in the treaty space law.

Let me quote the statement of Professor *Christol*: the general clauses of treaty space law "can be understood only by taking into account the high expectation for humanity engendered by the enormous challenges presented to Earth-based human as they have entered upon the exploration of the new dimension of the universe." (43)

* * *

General clauses are with all their contradictions elements of treaty space law – directly not enforceable as treaty provisions created or to be created in accordance with their rather moral guiding. In this sense they are legal norms. To take again an analogy from Roman Law: *leges imperfectae*. (44) Exceeding the limits of Parties to Treaties they relate to "mankind". *Leges perfectae* they will be only in a radically new structure of the international community based on confidence of state to state, men to fellow-men. I hope, the young generation of space lawyers will live to see it…

Endnotes:

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1.) See: German Civil Code (BGB) §.242, Hungarian Civil Code (PTK) §.4
2.) *A. Bueckling*, severely criticizing the role of general clauses in space law treaties wrote an interesting article "*Fluch* der Generalkauseln" – the play of words: instead of *Flucht* (fleeing), Fluch – "Curse of General Clauses". Zeitschrift für Rechtspolitik, Jg.16 (1983).
3.) *H. Watson–F. G. Fowler*: The Concise Oxford Dictionary of Current English. 1974, p.518
4.) *Webster's* Dictionary of English Language. New York 1991, p.607. *Black's* Law Dictionary. VII.Ed. 1999 St.Pal Min., p.971 *Oxford* Student's Dictionary II.Ed. pp.388-389
5.) Magyar Értelmező Kéziszótár (Hungarian Explaining Dictionary). Budapest 1977, p.316
6.) Magyar Szókincstár (Handbook of Hungarian Word-stock). Budapest 1999, p.217
7.) *B. Nagy*: Common Heritage of Mankind: the Status of Future Generations. IISL Coll. Proceedings 1988, p.319
8.) *A. A. Cocca*: The Common Heritage of Mankind Doctrine and Principle of Space Law – an Overview. IISL Coll. Proceedings 1986. The Polish authors *R. Hara–J. Stanczyk* criticize this "new Latinism" of *jus commune humanitatis* which as opposed to *jus gentium* has no roots in Roman Law. Space Law and Roman Law Concepts. – Postępy Astronautyki 1985, Nr. ¾, p.23
9.) *M. G. Markoff*: Traité de droit international public de l'espace. Fribourg 1973, p.272
10.) *M. I. Niciu*: Space Law and the Development of Public International Law. Revue Roumaine d'études international, XVIII. Année 6/74, p. 521. – Drept international public – Vol.I. Cluj-Napoca 1975, p. 89.
11.) *K. Nagy*: Nemzetközi jog (International Law). Budapest 1999, p.17
12.) *B. Nagy*: op.cit. Note 7. p.321
13.) *S. Gorove*: Studies in Space Law: the Challenges and Prospects. Leyden 1977, p.69
14.) *N. M. Matte*: Treaty Relating to the Moon. Manual of Space Law. Ed. by N. Jasentuliyana – Roy S. K. Lee, Vol.1. p.159
15.) *A. Górbiel*: International Regulation of the Use of the Lunar Natural Resources and the CHM Doctrine. Acta Universitatis Lodziensis 1983 Politiologia 9, p.12
16.) *S. Courteix*: L'accord régissant les activités des États sur la lune et les autres corps célestes. Annuaire Francais de Droit Public XXV. 1979, p.221
17.) *K. Tatsuzawa*: Political and Legal Meaning of the CHM. IISL Coll. Proceedings 1986, p.86
18.) *R. Arzinger*: On the Legal Contents and Significance of the CHM in Outer Space Law. IISL Coll. Proceedings 1985, p.210
19.) *R. V. Dekanozov*: The CHM in the 1979 Agreement Governing the Activities of the States on the Moon and Other Celestial Bodies. IISL Coll. Proceedings 1981, p.182
20.) E.g.: *F. Berber*: Lehrbuch des Völkerrechts. München-Berlin 1960, I.Bd. p.110. *O'Connell*: International Law. London–Dobbs Ferry N.Y. 1965. Vol.I. p.89. *G. Schwarzenberger*: A Manual of International Law (VI.ed.) London 1976, p.42. *J. G. Starke*: Introduction to International Law (VIII.ed.) London 1977, p.66. etc. In Hungarian Manuals: *H. Szegő*: Nemzetközi jog (International Law) Budapest 2000, p.19 ("rights and obligations laid down directly by the international law") *K. Nagy*: Nemzetközi jog (International Law) Budapest 1999, p.9 ("rights and obligations prescribed by the international law"). *J. Bruhács*: Nemzetközi jog (International Law) Budapest 1998, Vol.I. p.73. ("rights and obligations in case of disputes subjects of an international legal procedure")
21.) See: *M. I. Niciu* op. cit. Note 10. Space law and the Development… p.519
22.) Named "index of juristic personality" by *O'Connell*: International Law. London–Dobbs Ferry N.Y. 1965.Vol.I. p.89
23.) See: *B. Nagy* op. cit. Note 5, p. 321. ("The passive legal personality of mankind has to be acknowledged")

24.) The first sentence of the Charter declares as an aim of the UN "…to save succeeding generations from the scourge of war which twice in our lifetime has brought untold sorrow to *mankind*…"
25.) *M. G. Markoff* op.cit. Note 7, p.265
26.) From the grammatical interpretation of the provision it is obvious that the word *province* does not mean a space or territory, but the activities: exploration and use. See *B. Maiorsky*: A Few Reflections on the Meaning and the Interpretation of "Province of Mankind" and CHM Notions. IISL Coll. Proceedings 1988, p.60
27.) *G. Gál*: Space Law. Budapest–Leyden–Dobbs Ferry 1969, pp.170-171, 180
28.) *G. Gál:* The "Peaceful Uses of Outer Space" after the Space Treaty. Proceedings 1967
29.) *G. Gál*: Military Space Activity in the Light of General International Law. IISL Coll. Proceedings 2002, pp.164-165
30.) At the New Delhi Conference 2002 of the International Law Association the Space Law Committee proposed a separate protocol to the Space Treaty of 1967 giving a more precise meaning of the common benefit clause *in the light of present commercial space activities*. ILA Report 2002, p.196
31.) *A. Bueckling*: Zur juristischen Substanzlosigkeit des Begriffes: Gemeinsames Erbe der Menschheit. Deutsche Richterzeitung 1981 Aug. p.290
32.) *D. S. Myers*: Is there a CHM? IISL Coll. Proceedings 1990, p.335
33.) The origin of the idea to transfer the notion CHM into the system of space law is disputed in the literature Professor *A. A. Cocca*: suggested it to the COPUOS on June 19, 1967. Ambassador *Pardo* of Malta referred to CHM in a note-verbal on sea law August 17, 1967. *A. Bueckling* mentions a Resolution of the Institut de Droit International of 1937 on rights of sea fishery where it appeared in the form: "héritage commun de tous les hommes" in: Staatsgrenzen auf dem Mond. Juristenzeitung 1982 Nr.5-6, p.184
34.) *R. Hara–J. Stanczyk*: op.cit. Note 8, p.15.
35.) Webster's Dictionary. New York 1991 p.32
36.) *A. Berger*: Encyclopedic Dictionary of Roman Law. Philadelphia 1953. *Repr*. 1991, p.485
37.) *B. Nagy*: op.cit. Note 7, p.321
38.) "Due regard shall be paid to the interests of present and future generations…"
39.) *I. H. Ph. Diederiks-Verschoor*: An Introduction to Space Law. Deventer-Boston 1993, pp.91-92.
40.) Resolutions of VII (1969) and XII (1982) Kongresses of Instituto Hispano-Luso Americano de Derecho Internacional
41.) At the New Delhi Conference (2002) of ILA proposals were discussed for delation of the CHM formula replaced with "the province of all Mankind" (*Von der Dunk*) or "Common Concern of All Mankind" (*Maureen Williams*)
42.) *A. A. Cocca*: CHM a Basic Principle of the International Legal System. IISL Coll. Proceedings 1988, p.94
43.) *C. Q. Christol*: The Modern International Law of Outer Space. New York etc. 1982, p. 44
44.) This legal qualification of the general clauses has nothing to do with the obscure concept of "soft law" which by no means belongs to the treaty law, (See: *U. Fastenrath*: Lücken im Völkerrecht. Berlin 1991, p.178) and more than "means of a semantic strategy" (See: *A. Bueckling*: Normative Erschöpfung im universellen Völkerrecht. (Ein Beitrag zur rechtlichen Archaik) Bayerische Verwaltungsblätter. 1984, Nr. 20, p.70)